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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

CHRISTOPHER ANTHONY
HERNANDEZ,

Defendant and Appellant.

B200246

(Los Angeles County
Super. Ct. No. VA067803)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Dewey Lawes Falcone, Judge. Affirmed.

Edward H. Schulman, under appointment by the Court of Appeal, for
Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Lawrence M.
Daniels and Yun K. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

Christopher Anthony Hernandez appeals the judgment entered following conviction by jury of attempted willful, deliberate and premeditated murder in which he personally discharged a firearm causing great bodily injury (Pen. Code, §§ 664/187, 12022.53, subd. (d)),¹ attempted murder in which he personally used a firearm (§§ 664/187, 12022.53, subd. (b)), assault with a deadly weapon (§ 245, subd. (a)(1)), murder committed for the benefit of a criminal street gang in which he personally discharged a firearm causing death (§§ 187, 186.22, subd. (b)(1), 12022.53, subd. (d)), and attempted willful, deliberate and premeditated murder committed for the benefit of a criminal street gang in which he personally used a deadly weapon and personally inflicted great bodily injury (§§664/187, 186.22, subd. (b)(1), 12022, subd. (b), 12022.7, subd. (a)).

On appeal, Hernandez claims *Faretta* error (*Faretta v. California* (1975) 422 U.S. 806 [45 L.Ed.2d 562]), insufficiency of the evidence with respect to a criminal street gang enhancement and violation of the multiple conviction rule and double jeopardy principles with respect to the firearm enhancement associated with the murder conviction. We reject these claims and affirm the judgment.

FACTS AND PROCEDURAL BACKGROUND

1. The offenses.

Hernandez’s criminal liability is based on four separate incidents.

a. The Slam Dunk incident (Counts 1 and 2).

On the evening of September 23, 2001, Robert Hackett and Steven Molina Hernandez (Molina) went to the Slam Dunk bar in Whittier. As they left, Hackett saw Molina “kind of shadow boxing” in the parking lot in front of Hernandez and “saying that he was in good physical shape.” Hackett assured Hernandez that Molina was joking and drunk. As Hackett opened the passenger door for Molina, Hernandez produced a pistol which he cocked and fired at Molina. Hernandez then walked toward the passenger door, fumbling with the gun as if it had jammed.

¹ Subsequent unspecified statutory references are to the Penal Code.

Hernandez looked directly at Hackett, raised his hand over the door and aimed downward. Hackett pushed the passenger door into Hernandez, bumping him back. Hernandez then ran from the scene.

Molina was shot in the hand and the stomach. He had two surgeries and was hospitalized for three weeks.

b. *The assault upon Adrienne Aguayo (Count 3).*

On October 2, 2001, at approximately 10:00 p.m., Whittier Police Officer Paul Segura took a report from Adrienne Aguayo regarding an assault.² Adrienne Aguayo said Hernandez drove into her when she walked in front of his car, causing her to fall on top of the hood. She grabbed the windshield wiper to avoid falling off the hood. Hernandez stopped abruptly, causing her to fall into the street and break the windshield wiper off the car.

c. *Murder of Edward Aguayo (Count 4).*

On October 13, 2001, Gerardo Garcia gave Hernandez a .25 caliber Titan handgun and a box of ammunition.

On October 15, 2001, at approximately 5:45 a.m., Edward Aguayo was fatally shot in the left temple in an alley behind a row of small businesses in Whittier. When Michael Boyer, the owner of one of the businesses, heard a loud bang in the alley and went outside to check on his truck, a car drove down the alley past him. Shortly thereafter, Hernandez walked past Boyer and said, "Sounded like a gunshot, huh?" In a photographic lineup, Boyer identified Robert Meyer, a member of Hernandez's gang, as the driver of the vehicle.

Los Angeles Police Sergeant Robert Taylor found an expended .25 caliber automatic shell casing at the scene of the shooting. Taylor also found a piece of paper in Edward Aguayo's pocket that contained gang-related writing including the monikers of Edward Aguayo, Eric Viramontes and Robert Meyers. Taylor

² Adrienne Aguayo refused to answer questions at trial, claiming lack of recollection.

mentioned this piece of paper when he questioned Adrienne Aguayo and the individuals whose names were on the piece of paper.

On October 17, 2001, Hernandez approached Sonya Butcher in a casino in Las Vegas and asked if she would help him get \$100 from Western Union. Hernandez told Butcher “he had shot one of his homeboys at point blank range. He said that his homeboy had a note in his pocket with his name on it, and he said it was drug-related and his homeboys told him to leave because they were mad at him.”

Hernandez was arrested in Chicago on October 30, 2001, and was transported to Las Vegas, Nevada. While in custody there, he wrote a letter to his girlfriend, Gina Martinez, which stated: “I’m being charged with one murder in Whittier and two attempted. I am guilty of all charges.”

d. *Attempted murder of Jose Delgadillo (Count 5).*

On November 5, 2005, at about 8:45 a.m., Jose Delgadillo was playing handball on the roof of the Men’s Central Jail. Delgadillo got into a fight with an inmate who approached him and said Delgadillo had “g[iven] someone up.” The individual stabbed Delgadillo four times. Delgadillo admitted he identified Hernandez as the individual who attacked him but claimed he just wanted someone to pay for what happened to him.

Shortly after the attack, Delgadillo told Deputy Sheriff Kyran Jones that he was attacked by three or four inmates. Delgadillo said Hernandez shouted, “hold him” and then “shanked” Delgadillo. Delgadillo said he had testified in a case involving the shooting of a police officer.

A sheriff’s detective testified Delgadillo received reward money for his assistance in the apprehension and conviction of Jose Arzate for the attempted murder of a deputy sheriff in Norwalk in 2002.

2. *Defense counsel's argument to the jury; Hernandez's request to argue in propria persona.*

In argument to the jury, defense counsel asserted the only crime Hernandez committed with respect to the Slam Dunk incident was the voluntary manslaughter of Molina. Defense counsel asserted Hernandez lacked the intent to kill Hackett, noting he merely pointed the gun at him over the window. Regarding the assault upon Adrienne Aguayo, defense counsel suggested the statements of Adrienne Aguayo, an admitted methamphetamine user, were not worthy of belief. Regarding the murder charge, defense counsel noted Edward Aguayo had bruises on his hands that suggested he had been in a fight before his death and there was evidence he had been involved in a drug deal gone bad. With respect to the attack on Delgadillo, defense counsel argued Hernandez inflicted only superficial wounds and was not guilty of attempted murder. Defense counsel suggested the letter written to Gina Martinez constituted bragging. In closing, defense counsel asked the jury to find Hernandez guilty of attempted voluntary manslaughter and not guilty on the remaining counts.

Before the prosecutor commenced final argument, Hernandez asked, "Can I do my own closing argument?" The trial court denied the request.³ Hernandez then made an outburst as follows: "These guys are both terrible. [I'm] looking at life now." After the jury left the courtroom, the trial court indicated it thought defense counsel's argument went "extremely well." "So whatever you say is only going to

³ Hernandez previously represented himself in this case from February 2005 until November 2005, when defense counsel was appointed. Defense counsel represented Hernandez at the preliminary hearing in March of 2006. On March 20, 2007, day seven of ten for trial, Hernandez asked to represent himself and requested a continuance to prepare. The trial court denied the request finding it was not made within a reasonable time prior to trial, a number of out-of-state witnesses would be inconvenienced by a continuance, Hernandez failed to state a reasonable basis upon which the motion should be granted and the purpose of the motion was merely to delay the trial.

jeopardize you.” The trial court indicated it would admonish the jury to disregard any statements Hernandez had made and to decide the case on the facts and the law.

Hernandez then requested a hearing under *People v. Marsden* (1970) 2 Cal.3d 118. The trial court indicated, “It’s a little late in the game for a *Marsden* hearing” Hernandez insisted and complained that defense counsel failed to cross-examine witnesses and failed to call any defense witnesses. Hernandez concluded by stating, “It’s ridiculous. Perfect railroad job you guys did.”

When the jury returned, the trial court admonished it to disregard any comments Hernandez may have made and reminded the jury to decide this case only on the evidence and the law.

After the prosecutor’s closing argument and outside the presence of the jury, the trial court indicated Hernandez’s request to argue the case was denied because defense counsel already had argued and the defense “only get[s] one shot at speaking to the jury.” Further, because defense counsel had concluded argument to the jury, the trial court had no occasion to consider Hernandez’s complaints under *Marsden* as the trial had been completed and Hernandez’s remedy now lie on appeal, should he be convicted.

Thereafter, the jury convicted Hernandez as charged.

3. *Court trial on prior conviction allegations and sentencing.*

On May 9, 2007, the matter was called for court trial on the prior convictions allegations. After the trial court conducted a *Marsden* hearing, it indicated Hernandez would appear in pro per for sentencing.

On June 7, 2007, the trial court found Hernandez had a prior conviction of robbery within the meaning of the Three Strikes law, refused to strike the prior conviction (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497) and sentenced Hernandez to a lengthy prison term.

CONTENTIONS

Hernandez contends the trial court erroneously denied his request to argue to the jury in propria persona, the evidence does not support the criminal street gang enhancement imposed as to count 5, and enhancement of a murder conviction with a firearm enhancement under section 12022.53, subdivision (d) violates the multiple conviction rule and federal double jeopardy principles.

DISCUSSION

1. *The trial court properly denied Hernandez's request to argue in propria persona.*

Hernandez contends his request to argue to the jury in propria persona should have been granted because it was tantamount to a request to proceed in propria persona under *Faretta v. California*. Hernandez notes he did not seek a continuance to prepare the argument, there was no indication the argument would have disrupted the proceedings, and the request came immediately after defense counsel concluded argument and as soon as it became clear to Hernandez that counsel had failed to argue evidence Hernandez believed was relevant. (*People v. Windham* (1977) 19 Cal.3d 121, 127-128.) Hernandez notes the trial court granted a post-trial request for self representation for the purpose of sentencing and asserts the trial court similarly should have granted the request to argue to the jury. Hernandez concludes the trial court's ruling was an abuse of discretion that caused a structural defect in the trial proceedings and requires reversal. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 310 [113 L.Ed.2d 302]; *People v. Stewart* (2004) 33 Cal.4th 425, 462.)

This contention fails because Hernandez did not make an unequivocal demand for self representation. (*Faretta v. California, supra*, 422 U.S. at pp. 835-836; *People v. Weeks* (2008) 165 Cal.App.4th 882, 886.) Hernandez never indicated he wished to proceed without the assistance of counsel. Rather, he requested to make a closing argument after his counsel already had delivered one. This request reasonably is construed as a desire to supplement counsel's argument,

not a request to proceed in propria persona. Further, when the trial court discussed the matter with Hernandez outside the presence of the jury, Hernandez did not seek self representation. Rather, he requested substitution of counsel under *Marsden*.

Because Hernandez failed to make an unequivocal request to proceed in propria persona, he failed to preserve the right of self representation. (*People v. Valdez* (2004) 32 Cal.4th 73, 98-99; *People v. Barnett* (1998) 17 Cal.4th 1044, 1087; *People v. Marshall* (1997) 15 Cal.4th 1, 21-23.) Consequently, the claim of *Faretta* error fails.

2. *The evidence supports the criminal street gang enhancement imposed as to count 5.*

Hernandez contends the People failed to demonstrate the requisite number of “predicate offenses” within the mandatory three-year time period necessary to establish the criminal street gang enhancement allegation associated with count 5, the attempted murder of Delgadillo committed in 2005.

Hernandez notes the prosecutor argued the Slam Dunk offenses counted as two predicate offenses, the assault on Adrienne Aguayo counted as another, and the murder of Edward Aguayo was a fourth. Hernandez asserts these offenses cannot constitute the predicate offenses as to count 5 because these offenses occurred in 2001, more than three years before the alleged commission of count 5 in November of 2005.

Hernandez’s claim is not persuasive.

In order to prove a criminal street gang enhancement under section 186.22, subdivision (b), the prosecution must prove, among other things, that the gang “includes members who either individually or collectively have engaged in a ‘pattern of criminal gang activity’ by committing, attempting to commit, or soliciting two or more of the enumerated offenses (the so-called ‘predicate offenses’) during the statutorily defined period. [Citation.]” (*People v. Gardeley* (1996) 14 Cal.4th 605, 617, italics omitted.)

Section 186.22, subdivision (e) provides: “ ‘pattern of criminal gang activity’ means the commission of . . . two or more of the [specified] offenses, provided at least one of those offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense, and the crimes were committed on separate occasions, or by two or more persons.”⁴

Here, the predicate offenses committed in 2001 were committed after September 26, 1988. Also, the last of the crimes, the murder of Edward Aguayo, occurred within three years after a prior offense, namely, the attempted murders at the Slam Dunk and the assault of Adrienne Aguayo committed earlier that year. Further, these four crimes were committed on three separate occasions. These offenses therefore qualified as predicate offenses within the meaning of section 186.22, subdivision (e).

Contrary to Hernandez’s argument, there is no requirement the predicate offenses be committed within three years of the charged offense. Such a requirement would arise only where the prosecution seeks to use the charged offense as a predicate offense. (See *People v. Zermeno* (1999) 21 Cal.4th 927, 931-932; *People v. Loewn* (1997) 17 Cal.4th 1, 9-10.) Here, because there was a superabundance of predicate offenses committed in 2001, there was no need to use the 2005 attempted murder of Delgadillo as a predicate offense.

⁴ Consistent with this statutory definition, the trial court instructed the jury a “ ‘pattern of criminal activity’ means the commission of two or more of the following crimes, namely, attempted murder and assault with a deadly weapon, provided at least one of those crimes occurred after September 26, 1988 . . . and the last of those crimes occurred within three years after a prior offense, and the crimes were committed on separate occasions or by two or more persons.”

Hernandez's contention seeks to impose a "wash-out" period that is simply not found in the statute. Rather the statute requires the predicate offenses be shown to have occurred within three years of a prior offense. Consequently, the People properly could rely on counts 1 through 4 to establish the predicate offenses for the criminal street gang enhancement associated with count 5.⁵

3. *No violation of the multiple conviction rule or double jeopardy principles appears.*

Hernandez contends enhancement of the murder conviction with a term of 25 years to life in state prison based on the personal discharge of a firearm causing death under section 12022.53, subdivision (d), violates the multiple conviction rule because the only basis for the additional term is the proximate causation of death, which is an element of the underlying offense of murder. Hernandez concedes this argument was rejected in *People v. Sloan* (2007) 42 Cal.4th 110, 115-123 and *People v. Izaguirre* (2007) 42 Cal.4th 126, 130-134. However, he submits these cases were wrongly decided and seeks to preserve the issue for further review. (*People v. Jaramillo* (1993) 20 Cal.App.4th 196, 198.)

Hernandez also contends enhancement of a murder conviction with a firearm enhancement under section 12022.53, subdivision (d), violates federal double jeopardy principles. Again, Hernandez concedes his arguments are contrary to precedent. (*Hudson v. United States* (1997) 522 U.S. 93, 95-96 [139 L.Ed.2d 450]; *Missouri v. Hunter* (1983) 459 U.S. 359, 365-366 [74 L.Ed.2d 535]; *Blockburger v. United States* (1932) 284 U.S. 299, 304 [76 L.Ed. 306].)

⁵ We note in passing that the criminal street gang enhancement played no part in the term imposed by the trial court as to count 5. On that count, the trial court sentenced Hernandez to a base term of 15 years to life, doubled on account of the strike, plus a three-year enhancement for the personal infliction of great bodily injury and a one-year enhancement for the personal use of a deadly weapon.

Because Hernandez's contentions already have been rejected by courts of superior jurisdiction, we are unable to grant Hernandez the relief he seeks. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

DISPOSITION

The judgment is affirmed.

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KLEIN, P. J.

We concur:

CROSKEY, J.

ALDRICH, J.